TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
THE INTEREST OF THE AMICUS CURIAE	3
ARGUMENT	6
I. *The Court Below Was In Error In Its Premise That A Lockout By An Individual Employer is An Unfair Labor Practice*	6
A. The Opinion Contains a Misstatement of Law and Fact	7
B. The Court's Opinion Disregards Familiar Rules of Statutory Construction	8
C. Legislative History Refutes the Theory that Lockouts Were Prohibited by the Wagner Act	12
1. The Board recognized that some lockouts were lawful	14
2. This view was shared by President and Congress during War period, 1941-1946	16
II. *The Text of the Act Does Not Justify the Court's Conclusions*	21
CONCLUSION	23

TABLE OF AUTHORITIES CITED

Cases:	*Page*
Ballston-Stillwater Knitting Co., 6 NLRB 470	15
Betts-Cadillac, 96 NLRB 268	7
Brown McLaren Mfg. Co., 34 NLRB 984	15
Duluth Bottling Association, 48 NLRB 1335	7
Hobbs, Wall & Co., 30 NLRB 1027	15
International Shoe, 93 NLRB 107	7
International Typographic Union and Graphic Arts League, 87 NLRB 1215	5
International Typographical Union and Union Employers Section of Printing Industry of America, Inc., on behalf of New York Employing Printers Association, Inc., (Printers League Section) et al, 87 NLRB 1418; 190 F(2) 45 (C.A. 7, 1951)	5
Iron Molders Union v *Allis-Chalmers*, 166 Fed. 45, 52 (C.A. 7).	13
Jeffrey-Dewitt Insulator Co. v *N.L.R.B.*, 91 F. 2d 134, 137 (C.A. 4)	13
Joseph Levy et al, 24 NLRB 786	15
Lengel-Pencil Co., 8 NLRB 988	15
Leonard v. *N.L.R.B.*, 197 F. 2d 435	10
Magner v. *Kinney*, 141 Neb. 122, 2 N. W.(2d) 689	13
Morand Brothers Beverage Co., 91 NLRB 409, 99 NLRB 1448	8
Morand Brothers Beverage Co. v. *N.L.R.B.*, 190 F. 2d 576	10
National Labor Relations Board v. *Mackay Radio Corp.* 304 U.S. 333	22
Statutes:	
Labor-Management Relations Act, 1947, U.S.C.A. Title 29, Secs. 158, 159, 168	21
War Labor Disputes Act, 57 Stat. 163	17

In The

Supreme Court of the United States

October Term, 1956

No. 103

National Labor Relations Board,
Petitioner

v.

Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.

BRIEF FOR THE UNION EMPLOYERS SECTION, PRINTING INDUSTRY OF AMERICA, INC., AS AMICUS CURIAE

The Union Employers Section, Printing Industry of America, Inc., submits this brief *amicus curiae* to the Court in the genuine belief that it will aid the Court in the resolution of some of the questions presented by this case. The parties have consented to the filing of this brief in accordance with Rule 42(2).

STATEMENT OF THE CASE

This case is before the Court on writ of certiorari to the Court of Appeals for the Second Circuit. The decision which this Court is to review set aside an order of the National Labor Relations Board (referred to herein as the "Board") dismissing a complaint alleging that certain employers belonging to a multiple bargaining association, the Linen Credit Exchange of Buffalo, New York (herein

referred to as the "Association") violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (herein referred to as the "Act").

The case was tried before the Board on a stipulated set of facts (R. 16, 21-22).[1] Briefly summarized, the stipulation showed that for some thirteen years the employers against whom the complaint had issued had been members of the Association. During this period Truck Drivers Local No. 449, the charging party before the Board and Petitioner in the court below, had been the bargaining representative of the truckers employed by the members of the Association. It had been the practice of the Association to negotiate successive collective bargaining contracts with the Union covering wages, hours and other terms and conditions of employment with respect to the truck drivers.

Sixty days before the expiration of the 1952-53 agreement the Union served a written notice of a desire to negotiate a new contract. Bargaining conferences began shortly thereafter but the parties were unable to reach agreement by April 30, 1953, when the old contract expired. Negotiations continued, however, during the following month until on May 26, 1953, the Union local struck Frontier Linen Supply Company, one of the members of the employer association (R. 18). The other employers then locked out their employees, but the Association notified the Union that if it would terminate the strike at Frontier, the other companies would recall the locked out workers.

About a week later, as a result of further conferences between the Association and the Union, agreement for a new contract was reached. The Union then called off the strike against Frontier and the other companies immediately reopened, reemploying the drivers who had been laid off during the strike.

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[1] The letter "R" followed by a number refers to the page in the "Transcript of Record" printed for this Court after the writ of certiorari had been granted.

In dismissing the complaint the Board found that it was reasonable to infer that the strike against one employer carried with it an implicit threat of future strike action against the other members of the Association. Accordingly the Board concluded that the object of the strike was to destroy the solidarity of the Association by causing successive and individual employer capitulations to the Union's demands. Finding no independent evidence of anti-union motivation, the Board declared that the action of the employers in discontinuing operations until the strike at Frontier was ended, was privileged (R. 36).

On petition for review to the Court of Appeals for the Second Circuit a majority of the Court in an opinion written by Judge Frank disagreed (R. 42, 61), declaring that the lockout was illegal interference with the right of employees to engage in concerted activity and also constituted discrimination against the non-striking employees for the purpose of discouraging union membership. Hence the Court held that the Board should have found a violation of both Section 8(a)(1) and 8(a)(3) of the Act.

THE INTEREST OF THE AMICUS CURIAE

The Amicus, Printing Industry of America, Inc., with offices in Washington, D. C., is the principal national trade association for employing printers in the United States. The industry embraces all commercial printing, including book and job printing, with the exception of daily newspapers, which own and operate their own mechanical departments. According to the 1947 Census of Manufacturers the commercial printing industry is one of the major industries in the United States, employing 437,668 employees in 19,430 establishments and producing $4,400,000,000 worth of products annually.

The bulk of this industry is unionized. In the cities where there are numerous printing establishments, collective bar-

gaining with the various printing trades unions is conducted by associations of employing printers. Generally speaking, the major international unions in the printing field, e.g., the International Printing Pressmen and Assistants Union, AFL; the Amalgamated Lithographers Union, CIO; the International Typographical Union, AFL; the International Brotherhood of Bookbinders, AFL; and the International Electrotypers and Stereotypers Union, AFL, usually have but one local for any given city. This local admits to membership all the particular craftsmen in that area within the "jurisdiction" of the international union.

The practice of the international unions in organizing their locals on a multiple employer basis in the various printing centers developed more than 100 years ago. These unions then would meet and adopt a "scale of prices" which were presented to the individual shops for acceptance. It was not until the latter part of the 19th Century that in the large printing centers, like Philadelphia, New York and Chicago, employers associated together into community groups to confer and make contracts with the printing trades. Even then employers were slow to organize themselves on the same basis as the unions.[2] While this evolution has been gradual, the Union Employers Section, the division of the national trade association to which most of the companies which have union contracts belong, includes within its membership, approximately 60 local associations which negotiate collective bargaining agreements on a city-wide or metropolitan area basis with the different locals.

This system of bargaining developed many years before the enactment of the National Labor Relations Act. Consequently, as this relationship had already been established, very few printing employer associations or printing trades unions have been the subject of unit findings, elections or certifications under Section 9 of the Act. Nevertheless, the

[2] See H. A. Millis, *How Collective Bargaining Works*, pp. 126-129, 20th Century Fund, 1942.

Board has recognized that the employees of the various companies belonging to local employing printer associations constitute a single unit appropriate for collective bargaining, e.g., *International Typographical Union and Graphic Arts League*, 87 NLRB 1215, and *International Typographical Union and Union Employers Section of Printing Industry of America, Inc., on behalf of New York Employing Printers Association, Inc., (Printers League Section); Franklin Association of Chicago; Graphic Arts Association of Michigan, Inc., (Typographical Union Employers' Section); Graphic Arts Association of Michigan, Inc., (Rotary Newspaper Employers Division), and Printing Industry of Pittsburgh, Inc., (Union Employing Printers' Section); Master Printers Association of Newark and Vicinity (Union Shop Committee) and Men and Management Conference of St. Louis, Graphic Arts Industries (Employers' Division)*, 87 NLRB 1418; 190 F(2) 45 (C.A. 7, 1951).

The inability of individual employers in this industry to match the collective economic strength of the unions is due very largely to the small size of the typical printing establishment. While the industry does include some big integrated plants with as many as two or three thousand employees housed in a modern building designed for the production of magazines, mail order catalogues, telephone directories and popular books, such establishments are exceptional. The typical printing employer occupies a small section of a loft building in which a few linotype machines, a binding machine and perhaps a bedrock press are situated. A large segment of the industry consists of what are called trade composition houses, small employers who operate only a composing room and sell type in galley form to larger establishments. About 88% of the companies engaged in commercial printing employ only 20 wage earners or less.[3]

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[3] U. S. Census of Manufacturers, "*Wage Earners and Wages in Establishments Classified According to Number of Wage Earners*," 1947.

Unless these small companies are to be completely at the mercy of the well organized and highly disciplined craft unions, which in many cities have virtually a monopoly of the labor supply, they must depend upon associating themselves with other employers to maintain a united front. Obviously, such a united front cannot be maintained if our national labor policy, as embodied in the Taft-Hartley Act, prevents employers from bargaining with individual employees who desire a union to represent them and yet permits unions to single out individual employer members of a bargaining association and compel them to yield one by one to the union's demands. As we do not think that the Taft-Hartley Act intended any such paradoxical result, we believe the court below construed the Act erroneously.

ARGUMENT

I. *The Court Below Was In Error In Its Premise That A Lockout By An Individual Employer Is An Unfair Labor Practice.*

We fully agree with the Solicitor General that unless the members of a multiple-employer bargaining association, constituting a single bargaining unit, may lawfully suspend operations when a union representing their employees strikes a fraction of the membership, the equality of bargaining power which the Act was intended to protect has been destroyed. As the briefs of the Government and the other amici lucidly depict the catastrophic effect upon multiple-employer bargaining if the decision of the court below is permitted to stand, we shall not elaborate upon this point.

Wholly apart from the question of the rights of employers deriving from association bargaining units, however, it is our position that the Court of Appeals erred in its fundamental premise, viz., that a lockout by an individual employer is illegal *per se* if intended to exact pressure on

a union to agree on contract terms. From this premise, the court argued that the rights of individual employers were not enlarged by membership in an association bargaining group and hence the Board was wrong in holding that the multiple-employer lockout in this case was lawful.

We think it plain that neither before nor after the Taft-Hartley amendments of 1947 was the National Labor Relations Act ever intended to prohibit lockouts—absent an intent to avoid collective bargaining, to destroy a labor organization by discriminating against union employees, or to deprive employees of their right to select their own representatives and engage in concerted activity. This record makes it clear that the lockout in this case was not motivated by any such objectives. Accordingly, if the Court agrees with our contention it is unnecessary to pass upon the association unit issue.

A. *The Opinion Contains a Misstatement of Law and Fact.*

The premise of the court below to which we refer was stated by Judge Frank in his opinion as follows:

> "'The Board, in its brief, concedes, as it must, the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice. Up to the time of the decision in the instant case, the Board has held that only in unusual cases of economic hardship is an employer justified in locking out its employees when faced with a threatened strike.'"[4] (R. 45).

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[4] The court illustrated what it meant by "economic hardship" by citing cases where employers had shut down to avoid spoilage of materials or because of production or service problems which confronted them as a result of intermittent or threatened stoppages. Apparently in these cases there was no element of the shut down being intended to enable the employer to secure better contract terms. Thus, these cases, viz., *Duluth Bottling*, 48 NLRB 1335; *International Shoe*, 93 NLRB 107; and *Betts-Cadillac*, 96 NLRB 268, were decided on the ground that there was no lockout in the ordinary sense of that term. In other words, Judge Frank is saying in effect that lockouts are never justified, for the situa-

We respectfully submit that despite the concession to which the court refers (or perhaps because of it) both these propositions are incorrect. In our opinion, it has never been an accepted legal principle that a lockout to counter an anticipated or threatened strike amounts to an unfair labor practice. The purpose of the lockout is what determines its legality. Moreover, contrary to Judge Frank's assertion, the Board in its early history (as we shall demonstrate) consistently held that lockouts undertaken for the purpose of obtaining better contract terms from a union were lawful. It was not until 1950 when the Board handed down its decision in the *Morand Brothers* case, 91 NLRB 409, that the Board had ever held that a lockout was illegal, *per se*.

B. *The Court's Opinion Disregards Familiar Rules of Statutory Construction.*

Paradoxically, this holding by a divided Board[5] was made three years after the passage of the Taft-Hartley Act which contains certain provisions which should have set to rest whatever doubt might previously have existed as to the lawfulness of the lockout as a technique in bona fide collective bargaining. We contend that the *Morand* doctrine was formulated by the Board in disregard of the clear implications of these provisions and that the court below fell into the same error of statutory construction in adopting a Board position which that agency itself now seems to have abandoned.

One of these provisions is Section 8(d) of the present Act which requires parties to give 60 days notice in order to terminate collective bargaining agreements effectively.

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[5] Member Reynolds dissented in the first *Morand* case, 91 NLRB 409, and Chairman Herzog in the second, 99 NLRB 1448, to the proposition that a temporary lockout for purely economic purposes was illegal.

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tions which he deems permissible were not lockouts at all. See "Restatement of Torts, Sec. 788 Comment subdiv. (a)":

> "A lockout is an employer's withholding of work from his employees in order to gain a concession from them. It is the employer's counterpart of a strike."

During the period this notice is in effect, this subsection makes it the duty of both parties to continue—

> "in full force and effect, *without resorting to strike or lockout*, all the terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration of such contract, whichever occurs later." [Emphasis supplied.][*]

It is apparent from the foregoing language that by fixing a period during which strikes and lockouts would be prohibited, Congress assumed that such activity was permissible in the absence of such a prohibition, and therefore did not mean to prohibit either strikes or lockouts generally. If lockouts were already illegal *per se*—the underlying premise of the court below—there would have been no point in forbidding resort to such action merely during the 60 day notice period, for an employer engaging in such conduct whether or not he waited for the 60 days to run would have been committing an unfair labor practice.

Moreover, the accompanying reports reveal recognition by the committees in charge of the legislation of the legality of lockouts. See the Report of the House Conference Managers, H. Rept. No. 510, 80th Cong., 1st Sess., p. 35; H. Rept. No. 245, pp. 21, 22; and pp. 70-82; and the Report of the Senate Labor Committee, S. Rept. No. 105, p. 24. A colloquy on the floor between two members of the Senate Labor Committee, Messrs. Ball and Morse, also shows that this same understanding was shared by Senators on opposing sides in the debate. 93 Cong. Rec. 1893, 1894.

There is other intrinsic evidence in the text of the Act which also establishes this proposition. Thus, in Title II dealing with the duties of the Director of the Federal Mediation and Conciliation Service, it is provided (Sec. 203(c)) that the Director will seek to induce the parties to settle

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[*] The stipulated facts in this case reveal that both parties complied with the 60 day waiting period (R. 18).

their dispute "without resort to strike, *lockout* or other coercion". [Emphasis supplied.] Even more significant are the provisions in the same title dealing with national emergencies. Section 208(a) provides that upon receiving a report from a board of inquiry the President may direct the Attorney General to apply to the United States district courts "to enjoin such strike or *lockout* or the continuing thereof". Section 210 provides for the emergency injunctive orders being vacated after an 80-day period.

The conclusion is inescapable that once the order is vacated the lockout or strike may be resumed. Had lockouts been made illegal by the language of Section 8(a)(1) and 8(a)(3) of Title I, there would have been no occasion for giving the Attorney General authority to apply for injunctive relief against a lockout for an 80-day period. If a lockout were an unfair labor practice, *per se*, then whether it was local or national, it could have been enjoined for an indefinite period under the provisions of Section 10(j), Title I, which authorizes the Board to obtain injunctive relief against any unfair labor practice during the pendency of a complaint.

Section 8(d)(4) was the subsection upon which the Courts of Appeals for the Seventh and Ninth Circuits in *Morand Brothers Beverage Co.* v. *N.L.R.B.*, 190 F. 2d 576 at 582; *Leonard* v. *N.L.R.B.*, 197 F. 2d 435 at 439, respectively, relied, *inter alia*, in rejecting the Board's 1950 notion that a lockout intended solely as a means of causing a union to make contract concessions was unlawful. In brushing aside the obvious significance of this subsection, the court below after noting that no provision of the Act specifically prohibits or authorizes lockouts by employers (R-44), adopted the argument that the inclusion of the word "lockout" in the context of a provision forbidding both strikes and lockouts for a certain period stemmed from a Congressional desire "to emphasize even handed justice where union activity was being restricted" (R. 47).

The Court then quoted with approval, the Board's former theory that as Section 13 of the Act reserved the right to strike, the omission of any similar reservation respecting the right to lock out argued against any Congressional intent to establish that right (R. 47-8).

This reasoning does violence to basic canons of statutory construction. Section 13 (except for minor changes, not relevant here) was a part of the original Wagner bill, which was passed in 1935. It was apparently inserted to avoid any implication that labor's sole redress for such employer actions as were forbidden by the Act was to invoke the jurisdiction of the Board. But as the Wagner Act conferred no legal remedies upon employers, it was hardly necessary to state that management still possessed such methods of self-help as had not been proscribed. In fact, until the *Morand* case, the Board had never suggested that the language of Section 13 was necessary to preserve the right to strike on economic issues (i.e. issues unrelated to employer unfair labor practices).

It is true that the Taft-Hartley Act does not in express terms specifically authorize lockouts. One can also concede that the reference to lockouts in the 1947 statute does not reveal any Congressional intent to establish new rights for employers. What Section 8(d)(4) does is to render both strikes and lockouts unfair labor practices under certain circumstances, viz., failure to await the 60-day notice period. In other words, it purports to restrict the use of the lockout. Similarly, the other references to lockouts in Title II of the Act are also couched in terms of restricting lockouts rather than legalizing them.

But granted that a restriction does not create a right, it by no means follows that these restrictions were meaningless—a necessary conclusion if the lockout as a bargaining weapon was already an unfair labor practice as Judge Frank's opinion assumes. The real point is that the statutory language proscribing the lockout as a bargaining

weapon only under certain circumstances makes it difficult to escape the inference that under other circumstances Congress regarded the lockout as lawful. The attempt to avoid this inference by suggesting that the stated restriction on lockouts was a meaningless gesture intended only to make the statute appear two-sided would lead to absurd results. The only penalty which Section 8(d) imposes upon employers who lockout in disregard to the 60-day waiting period is to make such action an unfair labor practice. But if the court below is correct, all that Congress accomplished by its reference to employers in this subsection was to provide that employers who commit an unfair labor practice (i.e., a lockout) before the end of the 60-day period, are committing an unfair labor practice. In the actual administration of the Act, this would provide no deterrent for employers to postpone a lockout until the notice period expires, for the employer who waits before taking action would be equally guilty. Obviously, such an interpretation of the Act violates the familiar principle that courts should construe a statute so as to accord some meaning to every word or phrase.

C. *Legislative History Refutes the Theory that Lockouts Were Prohibited by the Wagner Act.*

Moreover, in order to agree with the theory that the 1947 restrictions on lockouts were unnecessary, one is forced to conclude that Congress either practiced deliberate fraud in order to make corresponding restrictions on strikes palatable to labor or was so ignorant of the legal setting in which it was framing amendments to the National Labor Relations Act that it was regulating a practice already completely outlawed. We do not believe, of course, that the court below drew the first inference. In view of its reference to prior Board decisions, however, it seems appropriate at this point to review briefly the relevant developments in Federal labor relations law prior to 1947, which we believe, removes any basis for the second inference.

Before the passage of the Wagner Act in 1935 the lockout was a technique not only used by employers opposed to any organization of their employees but also by employers accustomed to dealing with unions, as a means of securing a collective contract on terms not too onerous to management.

The term "lockout" itself has been defined by the courts as "a cessation of the furnishing of work to the employees in an effort to get the employer more desirable terms. Neither strike nor lockout completely terminates, when this is the purpose, the relationship between the parties." *Iron Molders Union* v. *Allis-Chalmers*, 166 Fed. 45, 52 (C.A. 7). See also, *Jeffrey-Dewitt Insulator Co.* v. *N.L.R.B.*, 91 F. 2d 134, 137 (C.A. 4); *Magner* v. *Kinney*, 141 Neb. 122, 2 N.W. (2d) 689.

The same meaning is ascribed to the term by text and case book writers: Millis & Montgomery, *"Organized Labor"*, p. 554; Gregory & Katz, *"Labor Law"*, pp. 147-148.

In their work entitled *"Organized Labor"*, Professors Millis[7] and Montgomery state (p. 554):

> "In exerting pressure upon employers to recognize them and accept their demands, unions . . . resort to the strike . . . The employers resort to corresponding methods—*the lockout* . . .
>
> "The strike has been and is organized labor's great weapon when differences are not settled by conciliation, mediation, or arbitration. From its use or threatened use the union obtains most of its power on the industrial field. *Its counterpart on the employer's side, and matching it fairly accurately, is the lockout.*" (Emphasis supplied.)

If the Wagner Act had contemplated so far-reaching a change in ordinary industrial warfare as the elimination of the lockout, it is strange that the sponsors of the Act made no reference to lockouts in the draft of their bill and

[7] Professor Millis was Chairman of the Board from 1940 to 1945, and had been a member of the predecessor Board, 1934-1935.

no explanation on the floor of Congress that this was one of the purposes of the legislation. Its legislative history, however, indicates that the Act was not intended to prohibit either strikes or lockouts as such. In explaining the bill to the Senate, Senator Walsh, Chairman of the Senate Committee on Education and Labor, said:

> "Mr. President, there are some fundamental rights an employer has, just as there are rights an employee has. No one can compel an employer to keep his factory open. No one can compel an employer to pay any particular wage. No one can compel an employer to hire others in addition to those he sees fit to hire. So with an employee, no one can compel him to work, no one can compel him to go on strike, no one can compel him to leave his work.
>
> "No one can keep an employer from closing down his factory and putting thousands of men and women on the street. So in dealing with this bill we have to recognize those fundamental things, and we have not gone into that domain. All we do is to remove the barriers that have kept employees away from their employers, which have prevented collective bargaining, which have resulted in strikes without any attempt to negotiate. All we have done is to promote the orderly processes of collective bargaining." (79 Cong. Rec. 7673.)

I. *The Board recognized that some lockouts were lawful.*

The Board created by the Act, however, soon recognized that the lockout was occasionally used as a weapon by some employers for halting incipient unionization and avoiding collective bargaining and holding—in our opinion quite correctly—that in such situations the lockout was a violation of Section 8(a)(1) and 8(a)(3). Thus, as early as 1938 when a case came before it dealing with the shut down of a plant for two days after a newly organized union had presented a petition for a wage increase, and opened

	Page
Harnischfeger Corporation, 9 NLRB 676	7
Home Beneficial Life Ins. Co. v. *N.L.R.B.*, 159 F. 2d 280	7
Hoover Company v. *N.L.R.B.*, 191 F. 2d 380	13
Hughes et al. v. *Superior Court*, 339 U.S. 532	12
International Brotherhood of Teamsters v. *Hanke*, 339 U.S. 470	12
International Typographical Union, 86 NLRB 951	11
Masiello v. *U. S.*, 235 F. 2d 279, certiorari denied, 77 S. Ct. 100	8
Medo Photo Supply Corporation v. *N.L.R.B.*, 321 U.S. 678	10
Morand Bros. Beverage Co. v. *N.L.R.B.*, 190 F. 2d 576	11
National Labor Relations Board v. *Acme Air Appliance Company, Inc.*, 117 F. 2d 417	10
National Labor Relations Board v. *Condenser Corp.*, 128 F. 2d 67	7
National Labor Relations Board v. *Draper Corp.*, 145 F. 2d 199	7
National Labor Relations Board v. *Fansteel Metallurgical Corp.*, 306 U.S. 240	6, 13
National Labor Relations Board v. *Highland Shoe, Inc.*, 119 F. 2d 218	10
National Labor Relations Board v. *Indiana Desk Co.*, 149 F. 2d 987	7
National Labor Relations Board v. *Local No. 1229*, 346 U.S. 464	8, 12, 13
National Labor Relations Board v. *Montgomery Ward & Co., Inc.*, 157 F. 2d 486	13
National Labor Relations Board v. *The Sands Mfg. Co.*, 306 U.S. 332	6, 13
National Licorice Co. v. *N.L.R.B.*, 309 U.S. 350	10
National Maritime Union of America, 78 NLRB 971. enforced 175 F. 2d 686, certiorari denied, 338 U.S. 954	10
Order of Railroad Telegraphers v. *Railway Express Agency*, 321 U.S. 342	10
Republic Aviation Corporation v. *N.L.R.B.*, 324 U.S. 793	12
Rockaway News Co. v. *N.L.R.B.*, 345 U.S. 71	13
Southern S. S. Co. v. *N.L.R.B.*, 316 U.S. 31	6, 13

only after the company had created an employee representation plan as a substitute for the union, the Board held this to be a violation of Section 8(a)(1) and 8(a)(3) and awarded back pay for the employees affected by the two-day lockout. *Ballston-Stillwater Knitting Co.*, 6 NLRB 470.

During the same year, however, another case came before the Board in which the same union had just organized a plant and threatened to strike unless the employer granted its wage demands. Before this threat could be made effective the employer locked out the employees. Throughout the lockout, as in this case, bargaining with the union continued, although ultimately no agreement was reached. The Board found that inasmuch as the company bargained during the period of the lockout, its purpose was not to discourage collective bargaining or membership in the union. Accordingly, the Board dismissed the complaint. *Lengel-Fencil Co.*, 8 NLRB 988.

During the next three years the Board continued to distinguish between permissible and illegal lockouts, applying the *Lengel-Fencil* doctrine whenever it appeared that the locking out employer was engaged in bona fide collective bargaining and not attempting to undermine the representatives selected by the employees. *Hobbs, Wall & Co.*, 30 NLRB 1027 (1941); *Brown McLaren Mfg. Co.*, 34 NLRB 984 (1941); *Joseph Levy, et al.*, 24 NLRB 786 (1940). To our knowledge none of these cases has been overruled and the failure of the parties to cite them to Judge Frank was apparently the basis of his erroneous statement that "up to the time of the decision in the instant case, the Board has held that only in unusual cases of economic hardship is an employer justified in locking out . . . when faced with a threatened strike" (R. 45).[8]

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[8] In formulating its 1950 theory, *Morand Brothers Beverage Co.*, 91 NLRB 409, that a lockout intended to minimize the effectiveness of a threatened strike is illegal, the Board seems to rely primarily upon a dictum in *Duluth Bottling Association*, 48 NLRB 1335. The *holding*

STATUTES:

Page

National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. 151, *et seq.*:

Section 2 (1) 11
Section 2 (2) 11
Section 7 ..... 7, 9, 10
Section 8 (a) (1) 5, 10
Section 8 (a) (3) 5
Section 8 (b) (1) (B) 11
Section 8 (b) (3) 9

MISCELLANEOUS:

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Gillingham, J. B., "The Teamsters Union on the West Coast," Univ. of Calif., 1956. (Institute of Industrial Relations Monograph No. 9) 3

Lahne, Herbert J., "The Intermediate Union Body in Collective Bargaining," (Industrial and Labor Relations Review, v. 6, no. 2, Jan. 1953, "The Teamsters," pp. 172-174) 4

U. S. Dept. of Labor, Bureau of Labor Statistics, "Analysis of Work Stoppages 1955." (Bulletin No. 1196) 4

2. *This view was shared by President and Congress during War period, 1941-1946.*

(a) *The establishment of the War Labor Board*

On December 17, 1941, shortly after the United States entered the Second World War, President Roosevelt arranged a conference of representatives of labor and industry to work out an agreement providing that for the duration of the war, all labor disputes should be settled without work stoppages (9 LRRM, 945). One of the proposals of the employer conferees was—"There shall be no strikes, lockouts, or work stoppages of any kind for the duration of the war." (9 LRRM, 947).

A similar suggestion, worded in almost identical language, was included in the proposals of the union conferees, namely:

> "It shall be accepted policy on the part of management and organized labor that there shall be no stoppages of work or lock outs during the present War." (9 LRRM, 949).

It was obviously the understanding of the conferees that lockouts were not generally prohibited by the National Labor Relations Act. The labor conferees also proposed that the National War Labor Board should not "attempt to adust a controversy when there is by agreement *of Federal law* a means of settlement," and that "the labor policies as established in the National Labor Relations Act shall continue unimpaired." (9 LRRM, 949).

The same understanding of existing law was apparently shared by President Roosevelt, for the text of the Execu-

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in that case, however, was that the lockout involved therein was not illegal and the Board did not profess to disagree with the trial examiner who had recommended dismissal on the authority of the *Lengel-Fencil* opinion and the other cases cited. As one of the allegations in the *Duluth* case was that one of the purposes of the lockout was to induce the employees to change bargaining representatives, the dictum was probably directed at lockouts of that type had the facts justified the allegation.

tive Order creating the new board contained a preamble reading as follows:

> "Whereas, as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes *or lockouts*, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adustment of such disputes:" (9 LRRM, 945). [Emphasis supplied].

(b) *The War Labor Disputes Act*

During the War period, Congress also assumed that lockouts, like strikes, were not outlawed by statute.

Thus in 1943, prior to any amendment of the Wagner Act, Congress passed the War Labor Disputes Act (Act of June 25, 1943; 57 Stat. 163).

It is plain from the language of Section 6 of this Act that Congress assumed that in the absence of new legislation, lockouts, as well as strikes, were legal, for it gave the President authority to deal with such interruptions of war production by seizing any plant, mine, or other facility where work stoppages existed. Section 3, which gave the President this power, contained a proviso reading as follows:

> "*Provided*, That whenever any such plant, mine, or facility has been or is hereafter so taken by reason of a strike, *lock-out*, threatened strike, *threatened lock-out*, work stoppage, or other cause, such plant, mine, or facility shall be returned to the owners thereof as soon as practicable . . ." (Emphasis supplied.)

Section 6 of the Act, designed to prevent interference with Government operations in plants, read in part as follows:

> "Sec. 6. (a) Whenever any plant, mine, or facility is in the possession of the United States, it

shall be unlawful for any person (1) to coerce, instigate, induce, conspire with, or encourage any person, to interfere, by *lock-out*, strike, slow-down, or other interruption, with the operation of such plant, mine, or facility, or (2) to aid any such *lock-out*, strike, slow-down, or other interruption interfering with the operation of such plant, mine, or facility by giving direction or guidance in the conduct of such interruption, or by providing funds for the conduct or direction thereof or for the payment of strike, unemployment, or other benefits to those participating therein . . ." (Emphasis supplied.) (12 LRRM, 2204).

(c) *The Truman Program*

When the cessation of hostilities was followed by numerous labor disputes which threatened an orderly return to a peacetime economy, President Truman on December 4, 1945, proposed that Congress enact legislation known as the "Labor Fact-Finding Board Act." He recommended that the legislation contain authority for the Secretary of Labor to certify to the President the existence of disputes seriously affecting the national interest, and the establishment of a thirty-day waiting period during which a fact-finding Board, created by the President, could conduct an investigation and make recommendations. Identical bills embodying the Administration's recommendations were introduced the next day in both houses of Congress.[9]

The text of Section 4 of those bills reveals that neither the President nor the draftsmen thought that either lockouts or strikes could be enjoined under existing law for even so limited a period as thirty days:

"Sec. 4 (a) During the period of five days following the date on which the Secretary of Labor makes a certification to the President under section 2 with respect to a labor dispute, and, if a board

[9] H.R. 4908 (Norton), and S. 1661 (Ellender), 79th Cong., First Session.

is appointed under section 3 to make an investigation concerning such dispute, during the period beginning when such board is appointed and ending five days after the date on which it submits its report—

(2) it shall be unlawful for any person to coerce, instigate, induce, conspire with, or encourage any person to interfere with or prevent such work or operations by *lock-out*, strike, or otherwise, or to aid any such *lock-out* or strike or other means of interfering with or preventing such work or operations by giving direction or guidance, or by providing funds for the conduct or direction thereof, or for the payment of strike or other benefits to those participating therein. . . .'' (Emphasis supplied).

(d) *The Case Bill*

When the Norton bill was reported to the floor by the Committee on Labor, the House adopted a bill in the nature of a substitute presented by Representative Case. On the Senate side, another substitute bill presented by Senators Taft, Ball and Smith, was adopted, and the House concurred in the Senate amendments. The enrolled bill, popularly known as the Case Bill, was then vetoed by the President, and the veto was sustained in the House.

The episode is significant, however, as showing that in the very year prior to the enactment of the Taft-Hartley Act, both the House and Congress passed legislation which discloses the premise that employers were still free to engage in lock-outs in the absence of statute. Hence the bill, in establishing a Federal Mediation Board, made it an unfair labor practice for employers to lock-out during the sixty-day period the Federal Mediation Board had the dispute under consideration. It also deprived employees of the protection of the National Labor Relations Act if they engaged in a strike during this sixty-day period. These provisions were contained in Section 3(b) of the Act.

"(b) Whenever the Federal Mediation Board proffers its services for the purpose of aiding in a settlement of a labor dispute affecting commerce and until the Board certifies that its efforts at mediation are concluded or until sixty days have elapsed since the Board's proffer of services, whichever date occurs first, it shall be the duty—

(1) of the employer or employers involved to refrain from any *lock-out* and to restore and maintain the rates of pay, hours, and working conditions which existed immediately prior to the time the dispute arose, except that changes agreed upon in writing with the employees or their representatives may be made; and

(2) of the employees and their representatives to refrain from any strike.

(c) Any employer who fails to perform the duties imposed upon him by subsection (b) of this section shall be deemed to have engaged in an unfair labor practice within the meaning of section 8 of the National Labor Relations Act, and the National Labor Relations Board is hereby authorized to utilize such powers as are granted to it by such Act to prevent and restrain such unfair labor practices and to grant appropriate affirmative relief.

(d) Any employee who fails to perform the duties imposed on him by subsection (b) of this section shall lose his status as an employee of the employer engaged in the particular labor dispute in connection with which such employee's failure occurred for the purposes of sections 8, 9, and 10 of the National Labor Relations Act: Provided, That such loss of status for such employee shall terminate if and when he is reemployed by such employer." (Emphasis supplied).[10]

The foregoing account of developments in Federal labor law reflects an understanding on the part of two presidents, the Labor Board, and the Congress, over the period

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[10] Excerpt from enrolled bill, H.R. 4908, as amended, 79th Cong., Second Session, 1946.

from 1935 to 1946 that lock-outs as such did not violate the National Labor Relations Act. It was against this background that Congress passed the Taft-Hartley Act in 1947.

In the light of this page of legal history, it is submitted that the restrictions on the lock-out in the Taft-Hartley Act were anything but meaningless, and it was not until the Board's decision in the *Morand* case, *supra*, that any agency of Government ever entertained this notion.

II. *The Text of the Act Does Not Justify the Court's Conclusions.*

In urging that the fundamental premise of the Court below was wrong, we do not take the position that a lock-out is never a violation of the Act. We recognize that a lock-out, like a strike, may under some circumstances, amount to an unfair labor practice. Thus, lockouts to blacklist strikers, discourage employees from joining or remaining members of a union, to induce workers to join company-dominated unions, or to deal individually with their employer rather than through a bargaining agent, are undoubtedly violations of Sections 8(a)(1), 8(a)(3), 8(a)(2) and 8(a)(5) of the Act, respectively. Similarly, strikes to cause employers to hire only union foremen, to discharge all non-union employees, to force an employer to boycott a particular supplier, or to pay money for services not performed are violations of Sections 8(b)(1)(B), 8(b)(4)(A) and 8(b)(6), respectively.

But in the instant case there is no showing whatsoever that the employers sought to make their employees give up their membership in the union or to make individual contracts of employment with them. The case, therefore, is completely distinguishable from the cases cited in footnotes 2 and 3 of the Opinion (R. 45), where administrative findings had been made that the employer's motive was illegal.

In reaching the conclusion that a lock-out intended to minimize the effectiveness of a strike was illegal *per se*, Judge Frank in his opinion relied strongly upon Section 7 of the Act, which guarantees to employees "the *right*" to engage in "concerted activities" and concluded that because a strike was concerted activity, such employer action as a lock-out constituted interference with this right, and was, therefore, a violation of Section 8(a)(1) of the Act. What the Court overlooked was the significance of the word "right." There are many cases which hold that although concerted activity may be lawful, an employer is permitted, without violating the law, to take appropriate steps to prevent the union from achieving the economic objectives of such activity. Thus in *National Labor Relations Board* v. *Mackay Radio Corp.*, 304 U. S. 333, it was held that even when the objectives of a strike are lawful, an employer may permanently replace economic strikers. Obviously any employer who does so, interferes to some extent with employees who exercise their right to engage in concerted activities. Indeed, it is difficult to conceive of a more severe or effective method of deterring them from continuing their strike. Yet it is not contended that such action by an employer would be a violation of Section 8(a)(1).

A fortiori, an employer who engages in a lockout in implementation of a "no contract, no work" policy in order to cause the union to yield to his terms and then rehires all the locked out employees after the settlement, as the employers did here, would clearly seem to be within his rights under the doctrine in the *Mackay* case.

As we have seen, the Board itself recognized this principle as applied to a lock-out in the early *Lengel-Fencil* case, 8 NLRB 988. Consequently, both the *Mackay (supra)* and *Lengel-Fencil* cases stand for the proposition that while employees have a right to engage in concerted activity, employers may check-mate the attainment of the economic goals of such activity, either by replacing the employees if

a strike has occurred, or by locking them out if a strike is imminent.

The language of Section 8(a)(3), upon which the Court below also relied, provides no support for its conclusions. If the decision of the Court below is correct, the record should show that the members of the Association "by discrimination in regard to . . . tenure of employment . . . discouraged [union] membership . . ."

The word "discrimination" in this context clearly implies disparity of treatment between union members and sympathizers on the one hand, and non-union or anti-union members on the other. There is not a scintilla of evidence in the record that any of the employers engaged in this kind of discrimination. They permitted none of their drivers, union or non-union, to continue at work, while the strike at Frontier was in progress. But immediately after the strike terminated, all the drivers were recalled and restored to their old jobs — again without discrimination. Accordingly, this record is devoid of any evidence—to say nothing of substantial evidence—which would have supported the Board in finding—as the court said it should—a violation of either Section 8(a)(1) or 8(a)(3).

CONCLUSION

In confining this brief to the single issue of the legality of the lockout, we do not mean to imply that we think the court below was correct in other particulars. We regard the parallel the court draws between the right of employers to withdraw from association units in advance of a collective bargaining commitment and the asserted right of the Respondent here to limit its bargaining, if it saw fit after an impasse, to a single member of the Association as a false analogy. Employer associations and unions derive their status as bargaining representatives under the Act as agents of employers and employees, respectively. Neither

agent is authorized to bargain for their respective constituents in a unit which is greater or less than the appropriate bargaining unit; and the appropriateness of the unit is reserved exclusively to the Board under Section 9(b) of the Act. Hence the argument advanced by other amici and the Government against any fragmentation of the established bargaining unit is another ground for reversing the holding of the court below.

The record also raises serious questions as to whether the union activity was not a clear violation of Section 8(b)(1)(B) and 8(b)(3). If this were the case, the union activity being illegal, the employees participating therein were not protected.

As both the issues concerning the bargaining unit and the legality of union conduct are covered in the briefs of the other amici, we did not develop them. If the Court agrees with us, however, on the basic principle that a lockout undertaken solely for the purpose of obtaining more advantageous terms in a collective bargaining agreement was never an unfair labor practice, *per se*, under the Act, we suggest that it is unnecessary for this Court to consider these more complex issues, for it could properly decide that on this ground alone, the decision of the court below should be set aside and the order of the Board affirmed.

Respectfully submitted,
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